BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARNITA SMALLWOOD	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,056,339
SELECT MANAGEMENT RESOURCES LLC	)	
Respondent	)	
AND	)	
	)	
COMMERCE & INDUSTRY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the December 14, 2011 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) impliedly found that claimant suffered personal injury by accident arising out of and in the course of her employment on the date alleged by designating David T. Gwyn, M.D., of Advanced Orthopedics, to be claimant's authorized treating physician for claimant's left upper extremity injury. Claimant's request for prescription reimbursement for past medical treatment with Dr. Gwyn was denied.

The respondent requests review of whether claimant suffered personal injury by accident arising out of and in the course of her employment on the date alleged. Respondent argues that claimant did not meet her burden of proof on this issue and therefore the Board should reverse the ALJ's Order and deny claimant's preliminary hearing requests.

Claimant argues the Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent under the business name Loan Smart Title Loans in Wichita. Her job title was floater and customer service representative and was tasked with assisting customers with title loans, and making notations in the accounts in regard to any action taken. The duties of the job included occasional light house cleaning, typing, phoning, filing, traveling to other stores and making bank deposits.

Claimant claims she injured her left wrist on March 4, 2011, while typing. She testified that she experienced difficulty only while typing, with no other physical activity causing her problems. When she reported to her supervisor that her wrist hurt she was told to see a doctor. However, no medical treatment was authorized by respondent or it's insurance company.

Claimant called the workers compensation number from a flyer in respondent's back room and got the names of physicians she could go to for treatment. She chose to see Dr. Gwyn because she had been treated by him for a previous injury on her right hand (a ganglion cyst) and she was comfortable with him. Claimant notified Robin Waller, the area manager, that she was going to see Dr. Gwyn.[1] There was no objection from the corporate office to claimant seeing Dr. Gwyn. Claimant denies ever having any problems with her left wrist or arm before March 4, 2011. Dr. Gwyn performed a physical examination, finding no swelling and a full range of motion. Claimant was tender to palpation over the scapholunate interval but all other testing proved to be negative. Dr. Gwyn felt claimant had synovitis and treated claimant with a left wrist cortisone injection and provided claimant with a left wrist splint.

Claimant was sent to Justin Strickland, M.D., by respondent's insurance company on April 15, 2011. At the initial appointment, claimant prepared a white sheet pain diagram which, strangely, indicated bilateral upper extremity complaints including numbness, stabbing pain, aching and pins and needles in her left wrist and forearm and tingling, numbness and pins and needles in her right wrist and forearm. Dr. Strickland's office note of April 25, 2011, indicates a history of bilateral wrist pain since March 4, 2011. Claimant displayed pain at the wrist level and a positive Tinel's at the left elbow. Claimant's right upper extremity exam was completely normal. Bilateral NCT testing was recommended.

At Dr. Strickland's recommendation, respondent sent claimant to Rizwan U. Hassan, M.D. for nerve conduction testing. The bilateral nerve conduction study was negative. Dr. Hassan diagnosed claimant with mild tenderness on the back of the left wrist. Tinel's sign was absent bilaterally.

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[1] P.H. Trans. at 9.

When claimant returned to Dr. Strickland on May 19, 2011, he determined that claimant was not in need of additional testing. He opined that in his professional opinion, any numbness and tingling in her hands is most likely not related to her work injury.

On June 6, 2011, claimant returned to Dr. Gwyn for a follow-up exam. She reported to Dr. Gwyn that Dr. Strickland diagnosed her with cubital tunnel syndrome after the NCT study was performed. Claimant again reported tenderness over the scapholunate interval, but maneuvers for cubital tunnel syndrome were negative. Dr. Gwyn recommended claimant have an MRI, but claimant was told that it would not be covered. He opined in his report of June 6, 2011, that if the MRI was normal, he would have little to further recommend. If the MRI were to display a carpal ganglion cyst, then surgical excision would be discussed.

Claimant describes the problems with her left wrist as a sharp pain especially when she tries to bend it or push it back, and throbbing. She is not able to use her left hand and arm very well. She believes that work caused this. She was at work when the pain started and testified that she was doing a lot of typing that day. Claimant denies that anything at home or school had anything to do with her wrist pain.

Claimant acknowledged that she used only her right hand to enter numbers on the keypad which is to the right of the computer keyboard. She used both hands to type letters. Claimant testified that each day brought a variety of tasks and some required more use of the hands than others. Respondent terminated claimant's employment on May 15, 2011.

Claimant testified that she does attempt to clean her house with the help of her family. This involves sweeping, wiping down counters, and folding clothes.[2] She testified that these activities, to some extent, aggravate the symptoms of her left upper extremity. Claimant also testified that although she moved during this time she didn't move anything and was not hurt during the move.

Claimant obtained a job at Aldi's after being terminated by respondent, but was taken off the work schedule because she was unable to pick up boxes or perform other work activities that she was asked to do. Claimant worked for Aldi's from August 2, 2011 to August 24 or 25, 2011. During that time she was being trained to be a casual clerk on a part-time basis, two to three days a week.

Robyn Waller, the area manager for respondent, oversees the offices in the Wichita area for the corporate office. She testified that she was normally at claimant's location every other week. She testified that the majority of the data entry for the employees is numeric and most employees use the number pad on the right side of the keyboard. It is

[2] P.H. Trans. at 31.

only when a new account is being opened that the there is a lot of typing. Ms. Waller testified that respondent's computer system can bring up the number of entries an employee does in a day and what task was being performed.

Ms. Waller testified that on March 4, 2011, claimant was working at the office on East Kellogg with another employee and a manager. She learned of claimant's wrist complaints on March 7, 2011. A workers compensation claim was filed with the insurance company. But the request for medical treatment was denied by respondent's insurance company. She told claimant that if she was really in pain she should go see a doctor. Claimant was also provided a special mouse pad and keyboard.

Ms. Waller testified that the company reports show claimant did not process any new loans on March 4, 2011 and that she did only one advance, which is where the customers' accounts are pulled up on the computer and the dollar amount is entered so that a check can be printed. Claimant generated 34 notes in accounts with an average of 19 characters. Claimant's total number of characters generated that day was 646.[3]

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[4]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[5]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[6]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of"

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[3] P.H. Trans. at 49-50.

[4] K.S.A. 44-501 and K.S.A. 44-508(g).

[5] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[6] K.S.A. 44-501(a).

> employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[7]

Claimant's testimony throughout this matter has been consistent regarding the cause of her left wrist pain. Claimant had no left wrist pain prior to March 4, 2011 and did nothing outside of work to cause the pain. The medical reports have reported tenderness over the scapholunate interval in the left wrist, but no explanation has been found for that complaint. Dr. Gwyn, in his June 6, 2011 report recommended an MRI test be administered to determine if a ganglion existed in the wrist.

This Board Member finds it disturbing that claimant consistently testified that the only problem she suffered at work was to her left wrist. Yet, when she appeared at Dr. Strickland's office, she suddenly displayed bilateral symptoms. When the tests and physical examinations failed to support a problem in her right upper extremity, that complaint disappeared.

> It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.[8]

Respondent requests that claimant be denied benefits for failing to prove that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. This Board Member finds, by the barest of margins, that claimant has satisfied her burden of proving causation. Dr. Gwyn has recommended one additional test, an MRI of the left wrist, in what appears to be a final attempt to identify what, if anything, is causing claimant's pain complaints in her left wrist. If that test proves negative, then he apparently has no added recommendation for treatment, nor an explanation for her complaints. This Board Member finds for preliminary purposes that claimant has satisfied her burden of proving, at this stage of the proceedings, that she suffered personal injury by accident to her left wrist which arose out of and in the course of her employment with respondent. The preliminary Order of the ALJ is affirmed.

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[7] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[8] K.S.A. 44-501(g).

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven, by the barest of margins, that she suffered personal injury by accident to her left wrist, which arose out of and in the course of her employment with respondent. The preliminary Order of the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated December 14, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: Alexander B. Mitchell, II, Attorney for Claimant
Jon E. Newman, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[9] K.S.A. 44-534a.